No. 47750-5-II

IN THE WASHINGTON STATE COURT OF APPEALS DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JICOREY BRADFORD

Petitioner.

APPEAL FROM THE SUPERIOR COURT

of Pierce County

Cause No. 11-1-04125-7

PERSONAL RESTRAINT PETITION – REPLY BRIEF

Wayne C. Fricke
WSB #16550

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant
1008 South Yakima Avenue, Suite 302
Tacoma, Washington 98405
(253) 272-2157

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I. STATEMENT OF THE CASE

A. Procedural History

The Pierce County prosecutor charged appellant JiCorey Bradford with two counts of first-degree assault, one count of drive-by shooting, one count of second-degree unlawful possession of a firearm, one count of possession of a stolen firearm and one count of possession of cocaine. CP 1-3. The State also alleged a firearm sentencing enhancement for the assault and cocaine possession charges. CP 1-3.

The court dismissed the cocaine possession charge for insufficient evidence. 1RP 611.[1] The jury was unable to reach a verdict as to one count of first-degree assault. CP 70. Mr. Bradford was convicted of the other count of first-degree assault with a firearm enhancement and one count each of drive-by shooting, unlawful possession of a firearm, and possession of a stolen firearm. CP 72-76.

The court sentenced him to a standard range sentence of 190 months for the assault with a 60-month firearm sentencing enhancement, for a total of 250 months. CP 96. Standard range sentences for the other charges were to run concurrently. CP 96. A notice of appeal was timely filed. CP 104. As part of the appeal, Mr. Bradford filed a statement of additional grounds, which included his argument that he was denied effective assistance of counsel for counsel's failure to request an instruction on the lesser included offense of second degree assault.

[1] There are seven physical volumes of Verbatim Report of Proceedings referenced as follows: 1RP - May 14-17, 21-24 2012 (six consecutively paginated volumes); 2RP July 11, 2012.

B. Facts

1. Substantive Facts

Petitioner adopts the statement of facts set forth in the original Appellant's Brief, but reiterates the following testimony for purposes of this petition.

Mr. Bradford testified that when a stranger in a car pulled up next to him and pointed a gun at him, he responded instinctively by grabbing his own gun and firing several shots at the car in self-defense. 1RP 675, 681. He testified that on October 7, 2011, he picked up his friend, James Gray, to give him a ride, but then had to stop by his brother's apartment to pick up his work clothes. 1RP 668-69. Mr. Gray waited outside. 1RP 646. In the breezeway of his brother's apartment complex, Mr. Bradford noticed two men, but no words were exchanged. lRP 671.

Just after they left the apartment, Mr. Bradford testified, he and Mr. Gray pulled over to change CDs in the stereo. 1RP 673-74. Another car stopped alongside them, and the driver's door flew open. lRP 673-74. Mr. Bradford testified the driver was one of the two men he had seen in the apartment complex. 1RP 674. The driver of the other car was very aggressive and said to Mr. Bradford, "I feel a funny-ass vibe coming from over there, and you got me messed up." lRP 674. When Mr. Bradford denied knowing what he was talking about, the passenger in the other car leaned forward and his hand came up. 1RP 675. In it was a gun, pointed at Mr. Bradford. lRP 675.

Mr. Bradford reacted by reaching under his seat to grab his own gun; he fired two or three times. lRP 675. He testified he fired from inside the car and did

not get out. lRP 675-76. He stated, "I just know I grabbed it and I brung (sic) it up toward the window area and I just fired like two to three shots. 1RP 676: 24-677:1. He further stated that he just reacted out of sheer instinct. 1RP 680:10-11. After the other car sped away, Mr. Bradford got out to see if there was damage to his car. lRP 676. Then he got back in the car, and headed back to his brother's via a side street. lRP 677.

On the way, the other car came at them again out of nowhere, cutting them off. 1RP 677, 679. He again saw a gun pointed at him through the passenger window. lRP 679. He testified that, when he saw the gun, he just reacted on instinct. 1RP 680. He fired once or twice from inside the car, but the hood of the other car was facing directly into his door and the armed occupants were still there. lRP 680. Feeling he was in the direct line of fire, Mr. Bradford got out and ran towards the back of his own car for cover. lRP 680. As he ran, he fired at the other car. lRP 681. He had his head down as he fired. RP 705:6-17. But then the other car drove away, so he jumped back in the car with Mr. Gray and together the pair fled. 1 RP 681-82. He testified they crashed on a grassy knoll at a nearby fire station, and he threw the gun out the window. lRP 683.

Shaken and confused, Mr. Bradford mistakenly told police Mr. Gray was driving at the time of the shooting because Mr. Gray was driving when they crashed. lRP 688-89. At trial, he testified Mr. Gray never drove until after the shootings, never possessed a firearm, and was not aware that Mr. Bradford had one in the car. 1RP 689, 714-15. But, he testified, there was no doubt in his mind that someone in the other car pointed a gun at him, twice. 1RP 690-91.

In both his trial testimony and his statements to police at the time, Mr. Bradford consistently maintained he acted in self-defense. Officer Holthaus, who responded to the fire station and found Mr. Bradford in the passenger seat, testified Mr. Bradford told him he and a friend noticed a car that was for sale and went to look. 1RP 333, 336-37. (It was undisputed there was a for sale sign in the window of the other car. 1RP 310-11.) He told Officer Holthaus they pulled up next to the car, and the passenger, who had a gun, asked why they were there. 1RP 338. When he saw the gun, Mr. Bradford told Officer Holthaus, he got out of the car quickly and fired several shots. 1RP 338. He then got back in the car and they drove away. 1RP 338. Officer Holthaus said Mr. Bradford told him he had recently purchased the car, but was not driving because he had no license. 1RP 341. According to Officer Holthaus' report, Mr. Bradford was "antsy" but cooperative and specifically told him he fired in self-defense after the passenger in the other car pointed a gun at him. 1RP 344-35, 350-51.

When Detective Conlon arrived, Mr. Bradford also told him the passenger of the other car had a gun. 1RP 521-22. Mr. Bradford told him Mr. Gray drove, while Mr. Bradford fired across the driver's seat and out the driver's side window in self-defense. 1RP 491-42, 550.

Officer Osness transported Mr. Bradford to the police station, and along the way, Mr. Bradford identified a photograph of Mr. Gray as the friend who was with him during the shooting. 1RP 354-55. Once back at the station, Mr. Bradford gave a video recorded statement to police. 1RP 494-95. In that

statement, he clarified he was driving the car, rather than firing from the passenger seat. 1RP 552.

Mr. Bradford stipulated he knew he was not permitted to possess a firearm because of his prior felonies, but, a man had recently threatened to shoot him in an unrelated dispute about a woman. 1RP 275, 689-90. So, when a man he met at a gas station offered to sell him a gun, Mr. Bradford took him up on the offer. 1RP 690. He testified he checked the gun's serial number, and, because it was not scratched off, he assumed the gun was not stolen. 1RP 709.

Conversely, Kerry Edwards gave conflicting accounts as to what had occurred. He testified he was the passenger riding along with his friend Dandre Long that day. 1RP 51-52. He claimed he noticed James Gray in the hallway of Mr. Long's girlfriend's apartment building but no words were exchanged. 1RP 51-53, 55, 173. He testified Mr. Gray gave him a funny look, which Mr. Edwards interpreted as Mr. Gray trying to figure out whether he (Mr. Edwards) was the owner of the car in the parking lot because he (Mr. Gray) wanted to steal it. 1RP 173-74.

After they left the apartment building, a car pulled up next to them, facing the opposite direction. lRP 61. In the other car were Mr. Gray and a person he did not recognize. lRP 62. Mr. Edwards claimed Mr. Gray opened the car door, flagged them down, and asked if there was a problem. lRP 61-62. Mr. Edwards claimed neither he nor Mr. Long said anything and neither of them had a gun. 1RP 61, 68-69. Mr. Gray then began shooting at them. lRP 61-62.

As they drove away, Mr. Edwards heard the back window burst. 1RP 62, 64. Mr. Edwards claimed he could see Mr. Gray standing in the middle of the street shooting. 1RP 63. He saw four or five shots and as he ducked down inside the car he also heard other shots hit the car. lRP 64.

Mr. Edwards testified that, in their attempt to get away, he and Mr. Long drove around the block and their car spun out as they rounded the corner. 1RP 62-64, 66. Mr. Gray's car went past them, stopped, and the shooting began again. 1RP 64, 67. Again Mr. Edwards identified Mr. Gray as the shooter. lRP 67-68. He and Mr. Long ducked down in the car and heard six or seven more shots hit the car. When the shooting stopped, they drove away. 1RP 67. Mr. Edwards denied pointing a gun at the other car or even having a gun and testified that if he had a gun, he would have returned fire. 1RP 185-86.

Mr. Edwards and Mr. Long had several opportunities to get rid of a weapon before any police investigation occurred. Although they had to go past the police station to get there, Mr. Edwards testified, he and Mr. Long drove to the parking lot of a store approximately two miles away. 1RP 70, 112, 313. Mr. Edwards claimed they had no contact with anyone and only stopped to phone Mr. Long's uncle and clean the glass off the seats. lRP 72. But surveillance photos show someone approaching their car and interacting with Mr. Edwards. 1RP 119-20, 178. The other car appeared to have been waiting for them in the parking lot. lRP 181-83.

Mr. Edwards testified he did not call 911 because Mr. Long did not want him to. 1RP 73. Instead, Mr. Long called his uncle. 1RP 72. The pair proceeded

to the uncle's home in Spanaway, about a 15-minute drive. 1RP 72-73. They parked the car behind the uncle's home where it could not be seen from the street. 1RP 73, 209. Mr. Long's uncle then drove Mr. Edwards to a nearby gas station, where a friend picked him up and he called Detective Hall, with whom he had a pre-existing relationship. lRP 73-74, 206-07.

The friend drove Mr. Edwards to the police station where he gave a video recorded statement to the police. lRP 74-77. Mr. Edwards admitted he was high from smoking marijuana at the time of the shooting, but did not tell police that at the time. 1RP 146, 152. In a photomontage Mr. Edwards identified Mr. Bradford, not Mr. Gray, as the shooter. lRP 79.

At trial, Mr. Edwards claimed he only meant to say that the person he identified was in the car with the shooter. 1RP 79. He testified he saw Mr. Bradford in the passenger seat of Mr. Gray's car before the first shooting, but did not see him at all after they rounded the corner or during the second shooting. 1RP 69. He claimed to never have seen either Mr. Bradford or Mr. Gray before the day of the shooting. 1RP 107-08. In his defense interview, Mr. Edwards claimed the person in the montage was the shooter, but claimed the picture was of Mr. Gray, not Mr. Bradford. 1RP 160-63. Detective Conlon testified that when he gave Mr. Edwards the photomontage, Mr. Edwards clearly and immediately identified Mr. Bradford as the shooter. 1RP 513-15.

Based on information from Mr. Edwards, Detective Hall retrieved the car from Mr. Long's uncle's home. 1RP 207-08. Mr. Long's uncle drove the car out of the carport for him. 1RP 210-11. Detective Hall did not look inside the car to

see if there was a firearm. 1RP 211. A forensic examination revealed a bullet lodged in the rear side of the driver's headrest. 1RP 329, 447. The analyst determined 13 shots hit the car. 1RP 481.

Mr. Edwards admitted he had a liking for firearms, but now has felony convictions which prevent him from possessing them. 1RP 169-71. He explained he recently pled guilty to 12 or 14 felonies. 1RP 172. There were 35 other co-defendants, among them many of his friends and an uncle. 1RP 192. Mr. Edwards and his co-defendants were all members of the Hilltop Crips street gang. 1RP 192. Mr. Edwards made a deal. He testified in one murder trial and gave information in a second case against ten other people. 1RP 195-96. He also gave police information on so-called "chop shops." 1RP 196-97. In exchange for his testimony against the other gang members all but two of the felonies were dismissed. lRP 193-94. He served roughly one year in prison. lRP 197. However, if he were found to have violated his plea deal by possessing a firearm, he would face a 30-year sentence. lRP 198.

2. Closing Argument, Jury Instructions, Verdicts

The defense theory of the case was that all the shots were fired in self-defense. lRP 821-22. In closing argument, both sides agreed the only real issue was whether Mr. Edwards had a gun. 1RP 798, 809. Defense counsel argued the assault and drive-by shooting charges would rise or fall together on that question. 1RP 821-22.

The jury was instructed that lawful use of force was a defense to assault in the first degree. CP 44. The jury was also instructed that Mr. Bradford could

not claim lawful use of force if he was the initial aggressor. CP 45 (Instruction No. 19)

II. ARGUMENT

Generally, to prevail in a Personal Restraint Petition, a petitioner must demonstrate that he was actually and substantially prejudiced by a violation of his constitutional rights or by a fundamental error of law, resulting in a complete miscarriage of justice. In the Matter of the Personal Restraint of Pirtle, 136 Wn.2d 467, 472, 965 P. 2d 593 (1998). However, when the claim is based on ineffective assistance of counsel, this heightened standard of prejudice is not required. The petitioner merely needs to show prejudice consistent with the standard set forth in Strickland, *infra*. See In the Matter of the Personal Restraint of Monschke, 160 Wn.App. 479, 490-91, 251 P.3d 884 (2010). Under the Strickland standard, prejudice is demonstrated when the petitioner demonstrates that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the trial would have been different. In the Matter of the Personal Restraint of Crace, 174 Wn.2d 835, 280 P.3d 1102 (2012).

Here, Mr. Bradford's petition meets both standards. Thus, the court should grant the petition and remand for a new trial.

1. THE COURT SHOULD CONSIDER THE INEFFECTIVE ASSISTANCE AND INSTRUCTIONAL CLAIMS NOTWITHSTANDING THAT APPELLATE COUNSEL MINIMALLY ADDRESSED THEM ON DIRECT APPEAL.

To the extent that the Court believes that these issues presented in this petition were addressed on direct review as argued by the state, the first issue for the Court's consideration is whether Mr. Bradford should be precluded from

presenting them in the petition because appellate counsel presented the general issue on direct appeal. Petitioner concedes that typically grounds that were already addressed on direct appeal cannot be resurrected via a Personal Restraint Petition. See In re Personal Restraint of Lord, 123 Wn.2d 296, 329, 868 P.2d 835 (1994). A "ground" is defined as a distinct legal basis for granting relief. In the Matter of the Personal Restraint of Taylor, 105 Wn.2d 683,688, 717 P.2d 755 (1986)(overruled on other grounds in In re Pers. Restraint of Nichols, 171 Wn.2d 370, 256 P.3d 1131 (2011)). To be "heard and determined", it must be shown that:

> (1)[T]he same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

In re Haverty, 101 Wn.2d 498, 503, 681 P.2d 835 (1984).

If the ends of justice require the issue be reexamined, then it may be relitigated. Pirtle, 136 Wn.2d at 473. The Washington Supreme Court has adopted the United States Supreme Court's discussion of the term:

> Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground. If factual issues are involved, the applicant is entitled to a new hearing upon a showing that the evidentiary hearing on the prior application was not full and fair; ...If purely legal questions are involved the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. Two further points should be noted. First, the foregoing enumeration is not intended to be exhaustive; the test is "the ends of justice" and it cannot

> be too finely particularized. Second, the burden is on the applicant to show that, although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground.

105 Wn.2d at 688 (*quoting* Sanders v. United States, 373 U.S. 1, 16-17, 10 L.Ed.2d 148, 83 S.Ct. 1068 (1963)).

Thus, the ends of justice requires rehearing of the issue because the appellate attorney failed to bring this matter to the attention of the appellate court in its entirety. Notwithstanding the Court's finding that the instructional error in failing to prepare a self-defense instruction was error in the context of the drive-by shooting charge. Likewise, the same argument applies to the assault charge and Mr. Bradford would have prevailed had his argument been presented.

Secondly, Mr. Bradford's pro se argument was not addressed, thus, this Court should hear the petition.

2. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THE LESSER DEGREE CRIME OF SECOND DEGREE ASSAULT WAS AVAILABLE FOR BOTH THE FIRST DEGREE ASSAULT CHARGES.

Mr. Bradford, in his pro se brief, argued that he was entitled to a lesser included (inferior degree) instruction on the first degree assault charges submitted to the jury. Specifically, he argued that his attorney was ineffective for failing to propose such an instruction on second degree assault.

The Court of Appeals acknowledged that his attorney was ineffective for neglecting to propose a self-defense instruction as to the drive by shooting charge, but gave short shrift to Mr. Bradford's pro se argument, simply stating,

"The statement raises no possibility that the latter claims are meritorious." Court's Opinion at 15.

However, as this Court is aware, an instruction on an inferior degree offense is proper when, (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (*quoting* State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). There can be no dispute, that second degree assault meets the first two requirements of Fernandez-Medina. The only issue is whether there is evidence that raises an inference that Mr. Bradford committed only the lesser degree offense. Fernandez-Medina, 141 Wn.2d at 455. In making this determination, "the evidence must affirmatively establish the defendant's theory of the case - it is not enough that the jury might disbelieve the evidence pointing to guilt." Fernandez-Medina, 141 Wn.2d at 456 (*citing* State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by* State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991)).[2] RCW 9A.36.021 provides, in relevant part, that a person commits second degree assault when he assaults another with a deadly weapon or with intent to commit a felony, assaults another. RCW 9A.36.021(1)(c), (e).

[2] An instruction on second degree assault would have also been warranted as a "lesser included" instruction analysis, since the elements for assault with a deadly weapon are necessarily included in the charge of first degree assault. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Here, Mr. Bradford testified that he shot in self-defense. At no time did he testify that he intended to inflict great bodily harm and, in fact, no bodily harm was inflicted. Specifically, during direct examination, he testified that "I just know I grabbed it and I brung (sic) it up toward the window area and I just fired like two to three shots. 1RP 676:24-677. Additionally, he stated that, "[he] just reacted out of sheer instinct." 1RP 680:10-11. This testimony was followed by cross examination wherein, in response to questions from the prosecutor, he stated that he fired shots as he was running away. 1RP 704:10-15. He further stated that he had his head down and shot while his head was down. 1RP 705:6-17.

Notwithstanding the state's argument to the contrary, this testimony, combined with the other testimony, affirmatively supports the reasonable inference that he never intended to inflict great bodily harm and that his actions could support a conviction for the lesser degree charge of second degree assault, as opposed to first degree assault. Under these circumstances, a lesser degree instruction on second degree assault was warranted under subsections (c) and (e) of RCW 9A.36.021.

That an instruction on second degree assault was warranted is further bolstered by the definition of assault contained within Instruction No. 9 , which states that "An assault is an intentional ...shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person." CP 35. Pursuant to this instruction, no injury needed to be inflicted to amount to an assault.

Thus, the testimony, in conjunction with the instruction on assault falls squarely within the statutory framework of second degree assault and the instruction on lesser included offenses should have been given.

3. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THE USE OF LAWFUL FORCE WOULD NOT BE A DEFENSE IF THE JURY FOUND THAT MR. BRADFORD WAS THE INITIAL AGGRESSOR.

For similar reasons, Mr. Bradford was prejudiced because of the "initial aggressor" instruction that was given during the trial, without any objection by his attorney.[3] The potential impact of a first aggressor instruction cannot go unstated. This instruction, perhaps more than any other, "potentially removes self-defense from the jury's consideration, relieving the State of its burden of proving that a defendant did not act in self-defense." State v. Bea, 162 Wn.App. 570, 575-76 (2011) (*citing* State v. Douglas, 128 Wn.App. 555, 563, 116 P.3d 1012 (2005)). Thus, the instruction should only to be given sparingly and in cases where the theories of the case cannot be sufficiently argued and understood by the jury without such an instruction. State v. Riley, 137 Wn.2d 904, 910 n. 2, 976 P.2d 624 (1999).

Whether sufficient evidence was presented at trial to justify a first aggressor instruction is a question of law and review is de novo. State v. Stark, 158 Wn.App. 952, 959, 244 P.3d 433 (2010) (*citing* State v. Anderson, 144 Wn.App. 85, 89, 180 P.3d 885 (2008)), *review denied*, 171 Wn.2d 1017, 253

[3] No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense. CP 47

P.3d 392 (2011). The State need only produce some evidence that Mr. Bea was the aggressor to meet its burden of production. State v. Wingate, 155 Wn.2d 823, 122 P.3d 908 (2005) (*citing* Riley, 137 Wn.2d at 909-10, 976 P.2d 624)).

Importantly, however, "the provoking act must be intentional and one that a "'jury could reasonably assume would provoke a belligerent response by the victim.'" Bea, at 577 (*quoting* State v. Wasson, 54 Wn.App. 156, 159, 772 P.2d 1039 (1989) (*quoting* State v. Arthur, 42 Wn.App. 120, 124, 708 P.2d 1230 (1985)), *rev. denied*, 113 Wn.2d 1014, 779 P.2d 731 (1989). The unlawful act constituting the provocation need not be the actual striking of a first blow, but rather, it must be related to the eventual assault as to which self-defense is claimed. Wasson, 54 Wn.App. at 159, 772 P.2d 1039. It is not the actual assault. State v. Kidd, 57 Wn.App. 95, 100, 786 P.2d 847, *rev. denied*, 115 Wn.2d 1010, 797 P.2d 511 (1990).

That is the critical inquiry here, one that the Court of Appeals left unaddressed. The only issue argued at trial was self-defense, with Mr. Bradford testifying that he shot without looking when the victims pulled guns out and he feared for his life. The victims testified that they had no guns and Mr. Bradford (they actually identified the codefendant as the shooter) simply fired at them without provocation. There was no testimony that any provocation forced the victims to act aggressively towards Mr. Bradford, which would have resulted in the need to act in self-defense. The entire case hinged on whether the victims were armed and whether Mr. Bradford's actions were warranted.

As such, the ends of justice require that the court grant the petition.

4. *THE COURT SHOULD GRANT THE PETITION BECAUSE TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ENSURE THE JURY WAS PROPERLY INSTRUCTED ON THE DEFENSE THEORY OF THE CASE.*

As appellant counsel argued to the Court of Appeals, Mr. Bradford was entitled to constitutionally effective counsel. U.S. Const. Amend. VI; Const. Art. I, § 22. Even when error is invited or not preserved, reversal is required when counsel's objectively deficient performance undermines confidence in the outcome of the proceedings. State v. Woods, 138 Wn.App. 191, 197, 156 P.3d 309 (2007); see also Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (review of instructional error "is not precluded where invited error is the result of ineffectiveness of counsel").

An error constitutes deficient performance when it falls below an objective standard of reasonableness, considering all the circumstances. State v. Woods, 138 Wn.App. at 197. Counsel is ineffective when counsel's conduct could not have been a legitimate strategic or tactical choice. Id.

Failing to ensure the jury is correctly instructed on the defense theory of the case is constitutionally deficient performance. State v. Thomas, 109 Wn.2d 222, 227-29, 743 P.2d 816 (1987); Woods, 138 Wn.App. at 201. In Thomas, defense counsel failed to propose an instruction that was crucial to Thomas' defense of diminished capacity. 109 Wn.2d at 227. The so-called Sherman[4] instruction would have informed the jury that the inference of willful and wanton disregard for the lives or property of others could be rebutted by evidence of

[4] State v. Sherman, 98 Wn.2d 53,653 P.2d 612 (1982).

voluntary intoxication. Id. at 226-27. In closing, defense counsel argued Thomas' intoxication negated the mental state required for the offense, but the jury was not instructed that the law supported that argument. Id. at 228. The court found counsel's performance deficient. Id.

The Thomas court also found the failure to request instructions crucial to the defense theory caused prejudice and required reversal. 109 Wn.2d at 229. Although the evidence was close, the court reasoned there was evidence Thomas was extremely intoxicated, but without the Sherman instruction, the jury may have believed this was irrelevant given her conduct. Id. Therefore, the court declared, "our confidence in the outcome is undermined such that we cannot say Thomas received effective assistance of counsel." Id. (*citing* Strickland, 466 U.S. at 694).

The Court of Appeals acknowledged that trial counsel was ineffective for failing to request a self-defense instruction as to the drive by shooting charge. Court's Opinion at 7-8. The same rational should apply as it relates to the failure to give the instruction on second degree assault and/or the failure to object to the initial aggressor instruction. The state completely leaves this issue unaddressed, presumably because it cannot contest that this court has already ruled in favor of the petitioner on this matter.

As such, the Court should grant the petition.

5. *MR. BRADFORD WAS DENIED HIS UNITED STATES AND WASHINGTON CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.*

One's right to effective assistance of counsel under the Sixth Amendment and Const. Art. I § 22 is not restricted to trial counsel. It also applies to appellate counsel's failure to raise a legal issue on appeal. See In the Matter of the Personal Restraint of Maxfield, 133 Wn.2d 332, 945 P.2d 196 (1997).

In order to prevail on an appellate ineffective assistance claim, petitioner is required to demonstrate that the legal issue which counsel failed to raise had merit and that he suffered actual prejudice based on the failure to either raise the issue or "adequately raise the issue". 133 Wn.2d at 344. As set forth above, it is Petitioner's position that the grounds of ineffective assistance of trial counsel and prosecutorial misconduct brought on direct appeal were not adequately raised on direct appeal and he has suffered actual prejudice as a result.

In representing Mr. Bradford, appellate counsel's duty includes a duty to research the law. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)(*citing* Strickland, 466 U.S. at 690-91)). As set forth above, the courts have consistently addressed conduct that is at issue in this case and consistently reversed convictions based on identical misconduct and ineffective assistance claims. Appellate counsel was certainly aware of the self-defense argument as she brought the issue to the court, but only in the context of a single charge. However, the self-defense instruction should have been given in the context of the entire case; thus she was ineffective for not bringing it to the court's attention

in the context of the assault charge—they were based on the same conduct. Thus, Mr. Bradford has demonstrated prejudice and the petition should be granted.

III. CONCLUSION

Based on the above cited cases, files and authorities, Mr. Bradford respectfully requests this Court grant his petition and remand his case for retrial.

Respectfully submitted this 16th day of December, 2015.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

WAYNE C. FRICKE
WSB #16550

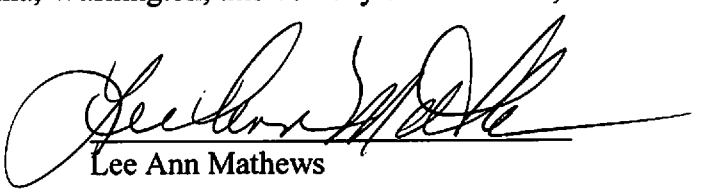
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the reply brief re: personal restraint petition to which this certificate is attached, by United States Mail, email or ABC-Legal Messengers, Inc., to the following:

Jason Ruyf
Deputy Prosecuting Attorney
930 Tacoma Avenue South, #946
Tacoma, WA 98402

Jicorey Bradford DOC #850561
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

Signed at Tacoma, Washington, this 16th day of December, 2015.



Lee Ann Mathews

HESTER LAW OFFICES

December 16, 2015 - 12:05 PM

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